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No.

IN THE

# SUPREME COURT OF THE UNITED STATES

**October Term, 1997**

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**LINDA STETLER** - - - - - - - *Petitioner*

*versus*

**LEWIS and MARY SANDERS, Et. Al.** - *Respondents*

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**On Petition for Writ of Certiorari to the Supreme Court of the Commonwealth of Kentucky**

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## PETITION FOR WRIT OF CERTIORARI

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35 pp

## QUESTION PRESENTED FOR REVIEW

Did the Orders of the Clinton Circuit Court deprive the Petitioner of the Due Process of Law in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States?

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**On Petition for Writ of Certiorari to the Supreme Court of the Commonwealth of Kentucky**

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## PETITION FOR WRIT OF CERTIORARI

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Linda Stetler, the Petitioner herein, prays that a writ of certiorari issue to review the judgment of the Kentucky Supreme Court entered in the above-entitled case on December 10, 1997.

## OPINIONS BELOW

The opinion of the Kentucky Supreme Court (unreported) is printed in Appendix A hereto, *infra*, page 1a. The judgment of the Kentucky Court of Appeals is printed in Appendix A hereto, *infra*, page 2a. The judgment of Clinton Circuit Court is printed in Appendix A hereto, *infra*, page 8a.

## JURISDICTION

The judgment of the Kentucky Supreme Court (Appendix A, *infra*, page 1a) was entered on December 10, 1997. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. §1257(a).

## CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V, set out in Appendix B, *infra*, at page 14a.

United States Constitution, Amendment XIV, set out in Appendix B, *infra*, at page 14a.

## STATEMENT OF CASE

The present dispute arises from several unfortunate events concerning "Spring Creek Airport," a "fly-in" resort community in Clinton County, Kentucky on the shores of Dale Hollow Lake. The airport, communal areas, and most of the undeveloped tracts at Spring Creek are owned and operated by Spring Creek Enterprises, Inc. ("Spring Creek").

While possessing unique attributes, Spring Creek also possesses unique problems of management. Management must concern itself not only with the upkeep of communal areas, but also with compliance with the various State and Federal Laws governing airport access and management. Linda Stetler manages this property for Spring Creek. Certain actions taken in the routine management of this property including sectioning off areas presenting traffic-flow dangers to the landing strips of the airport resulted in law suits being filed by Respondents.

These actions of Spring Creek caused strong and sometimes violent opposition. Escalation occurred such that arson and threats of bodily injury did in fact take place. While respondents argued in the court below that the Circuit Court had found at the Contempt Hearing that Linda

Stetler "was in fact the precipitating factor in the problems that existed at the airport," the truth is otherwise. The Judge merely expressed his frustration with the situation in general at Spring Creek and determined, albeit improperly, that an earlier Agreed Order had been violated by Linda Stetler.

Respondents have attempted to blame the Petitioner Linda Stetler for all manner of problems at Spring Creek. For example, the Respondents have insinuated that even the fires to their property at Spring Creek were a result of Petitioner's actions. Any such intimation would be strongly opposed by Petitioner who has experienced similar attacks upon her possessions, along with attacks upon her person by one of the Respondents. It is undeniable that a confrontational situation existed at Spring Creek, but Respondents' attempts to blame them on Petitioner is wrong and slanderous.

It is necessary to explain the lamentable situation of Spring Creek in order to create the framework in which the circuit judge's Order of Contempt was entered. While the circuit judge's frustration with the overall situation is extremely reasonable, his actions to "make an example" of the Petitioner in isolation, however, should be overturned. That the Respondents did an effective job of "bending the judge's ear" at the first unopposed hearing does not change the legal framework for a contempt order.

Petitioner insists that the Contempt Order issued by Judge Lovelace was in fact a criminal contempt, not of civil nature. The statements made by Mr. Choate, counsel for Respondents, in the contempt hearing asked for the punishment of Ms. Stetler, not for any sort of economic damages.

Further, after the Contempt Order was issued, a "WANTED" poster depicting Ms. Stetler was distributed in the general area of Spring Creek and nearby locations.

This "wanted" poster was made to look as if it was put out by official authorities seeking Ms. Stetler for contempt of court. The poster references the fact that she is "a heavy user of cosmetic make-up" and "has been known to claim to be 45 years of age." It attempts to paint a pathetic picture of Ms. Stetler and even implies she abuses elderly persons stating she "has been known to solicit money from the elderly" for various causes. It further copies the criminal section on aiding and abetting and warns others not to harbor such "fugitives from justice" as Ms. Stetler. Petitioner believes that Respondents were responsible for the issuance of these posters, although she did not see the posters being placed.

True enough, this is not a matter concerning defamation, but this poster is further evidence of the Respondents' intentions to harass and intimidate the Petitioner through non-official methods. The "Motion to Hold in Contempt" filed by Respondents was their attempt to harass and intimidate the Petitioner by ostensibly legal means. It was successful, but violates the laws of these United States and of the Commonwealth of Kentucky.

The "Motion to Hold in Contempt" surrounded an alleged violation of an Agreed Order entered between the parties on September 30, 1995. Its provisions will be discussed more fully in detail, but it generally concerned the problems experienced at Spring Creek including access to roadways and the fact that Respondents had begun a "smear campaign" in the surrounding area, warning the public not to buy in Spring Creek and taking many actions similar to the "wanted" poster incident.

On September 25, 1995 Respondents filed an action seeking Declaratory Judgment to the effect that certain roadways and taxiways were open to public use and that Petitioner had intentionally barricaded access in an attempt to deny Respondents access to their properties.

A hearing on the issues was held in Clinton Circuit Court on September 30, 1995 during which an agreement was reached. An Agreed Order to that effect was signed on October 2, 1995 and entered in the court record on October 4, 1995.

On October 31, 1995, Respondents filed a "Motion to Hold in Contempt" alleging that Petitioner Stetler and Spring Creek had violated paragraph 5 of the Agreed Order by failing "to remove barricades at the entrance to the runway from Olympus Drive, a distance of 33 feet from the south edge of the concrete walk in front of the real estate office and also remove the existing tree stump to ground level."

In her Verified Response, Petitioner stated that she was in full compliance with paragraph 5. There was no allegation in the "Motion to Hold in Contempt" that any other provision of the Agreed Order had been violated.

A hearing on the Respondents' motion was held on November 15, 1995, in the Clinton Circuit Court. Petitioners were not present and were unrepresented at that hearing for reasons that the court later found to constitute "excusable neglect," namely major surgery upon Petitioner's daughter. After hearing the Respondents' unrebutted evidence, the Court found the Petitioner to be in contempt of the Agreed Order.

Because of the excusable neglect, Petitioner's subsequent Motion to Stay to stay the November 15th order was granted by the court. The second hearing was held on November 22, 1995. At that hearing the Petitioner presented proof that she had complied with paragraph 5 to the letter. In fact, while the Agreed Order required she remove the barricades to allow the Respondents 33 feet for access to their property, the Petitioner removed them to allow 39 feet 5 inches wide for ingress and egress. This would allow as many as five cars to travel the access si-

multaneously. It bears pointing out here that these barricades were never placed on the airport to harass the Respondents as they asserted. Rather, they were necessary safety measures to bar the driving of vehicles onto the runway itself for obvious but essential safety reasons which will later be discussed.

Although the "Motion to Hold in Contempt" alleged only that the Petitioner had violated provision 5 relating to the 33 feet of barricades at Olympus Drive and to the removal of a tree stump, the court, at the November 22, 1995 hearing, allowed testimony as to violation of other provisions of the Agreed Order over objections by Petitioner's counsel.

In the Judgment and Order entered on December 6, 1995, Judge Lovelace found the Petitioners to be in contempt of the Agreed Order and ordered Linda Stetler to serve thirty (30) days in jail, pay a fine of Twenty-Two Thousand and 00/100 Dollars ($22,000.00) for 44 separate day violations each at $500.00 a day and to:

> pay the legal fees of . . . legal counsel for Plaintiffs, in the sum of $500.00 for the bringing of the Motion for Contempt and the hearing on same that was held on the 15th day of November, 1995. Defendants shall further pay all legal fees of Plaintiffs counsel that pertain to subsequent legal services rendered pursuant to the above reference actions subsequent to the date of November 15, 1995 at the rate of $100.00 per hour.

The Court of Appeals denied a Writ of Prohibition, but heard the matter as an appeal from a final judgment. The Court of Appeals upheld the entire Contempt Order except the granting of attorney's fees for violations that had yet to take place. Further, the court upheld a grant of $500.00 attorney's fees although only $250.00 had been requested.

A Petition for Rehearing was filed by Petitioner, but was denied by the Court of Appeals. The Petitioner then

moved the Kentucky Supreme Court to grant Discretionary Review. That Motion was denied, and this Appeal followed.

## REASONS FOR GRANTING WRIT

### I. The Opinion of the Court of Appeals Violates State and Federal Law.

Before serious punishment may be inflicted in a contempt proceeding, the alleged contemnor must first be found guilty beyond a reasonable doubt by a jury. *International Association of Firefighters* v. *Lexington-Fayette Urban County Government*, Ky., 555 S.W. 2d 258 (1977). If the fine or penalty is determined to be "petty," then a jury is not constitutionally mandated. The punishment of $22,000.00 in fines and one month imprisonment is not a petty fine, thus a jury trial was mandated to determine the underlying facts of the matter. *Id.*

The Fourteenth Amendment to the United States Constitution imposes upon states the requirement of Article III that jury trials be available to criminal defendants. *Duncan* v. *State of Louisiana*, 391 U.S. 145, 154 (1968). Prosecutions for criminal contempt fall within the coverage of this constitutional guarantee. *Bloom* v. *State of Illinois*, 391 U.S. 194, 200 (1968). Alleged criminal contemnors must be given a jury trial, therefore, unless the penalty actually imposed falls within the "petty offense" limit. *Dyke* v. *Taylor Implement Mfg. Co.*, 391 U.S. 216, 219-220 (1968).

This Court has not yet articulated a definitive standard for determining whether a particular contempt fine constitutes a "serious offense" rather than a "petty offense". Indeed, when the question most recently came before it, the Court specifically declined to do so. *United Mine Workers* v. *Bagwell*, 129 L.Ed.2d 642, 658 n. 5 (1994). It is true that in *Muniz* v. *Hoffman*, 422 U.S. 454 (1975), this Court

found that a fine of $10,000.00 was not sufficient to constitute a "serious offense". In making that determination, however, the Court analyzed the identity of the defendant. *Muniz*, 422 U.S. at 477. The defendant in that case was a labor union local which "collects dues from some 13,000 persons." *Id.*

Whether the ability of an individual defendant to pay a particular fine is a factor which courts must consider when determining the right to a jury trial, is a question on which the circuits are split. The Ninth and Tenth Circuits, on the one hand, hold that courts may not consider this as a factor. *U.S.* v. *Hamdan*, 552 F.2d 276, 279-280 (9th Cir. 1977); *U.S.* v. *McAlister*, 630 F.2d 772, 774 (10th Cir. 1980). On the other hand, both the Eighth Circuit and the District of Columbia Circuit have resorted to such analysis to determine whether a jury trial was required. *Girard* v. *Goins*, 575 F.2d 160, 164-165 (8th Cir. 1978); *Douglass* v. *First Nat. Rlty. Co.*, 543 F.2d 894, 902 (D.C. Cir. 1976).

The Court, therefore, should grant certiorari in order to resolve this split among the circuits, and resolve the question of whether an individual contemnor must be treated differently than the corporate contemnor in *Muniz*.

It is significant, however, that in no reported case has the levy of fine over $5,000.00 against an individual contemnor without a jury trial, been upheld.

While no Kentucky case addresses the issue, most jurisdictions have held that when each day is counted as a contempt of court, the whole amount should be measured and not each day in isolation. *See, e.g., Conn* v. *Superior Court*, 196 Cal. App. 3d 774, 242 Cal. Rptr. 148 (1987). Thus, $22,000.00 and not the $500.00 meted out daily should be tested for excessiveness in this case. An early Court of Appeals decision had held that any fine over $500.00 or punishment over 6 months required a jury.

*Miller* v. *Vettiner*, Ky. App., 481 S.W.2d 32 (1972). The Kentucky Supreme Court in *International Association* overruled the portion of that opinion which held that $500 is always excessive, or "serious" punishment. It found that $10,000.00 was not excessive without jury trial when levied against an organized union with over 300 members. The Court stated, "it is not tenable to argue that the possibility of a $501 fine would be considered a serious risk to the large corporation or labor union." *Id.* at 260.

There are two differences now presented from the $10,000.00 fine held acceptable in *International Association*. First, a $22,000.00 amount is a significant increase to $10,000.00, even factoring in interest. Second, and more important, is that Linda Stetler is an individual and she is an individual with limited ability to pay such an amount. Respondents may go to great lengths to demonstrate that the fine was also against Spring Creek, Inc., but they cannot assure that Spring Creek will pay. Also, Spring Creek cannot be physically constrained to a jail cell as will be Linda Stetler unless action is taken by this Court. Further, any ability to pay such a large fine has been hampered by Respondents' smear campaign warning persons not to buy property at Spring Creek.

The more recent decision in *Vaughn* v. *Asbury*, Ky. App., 726 S.W. 2d 315 (1987) strengthens the position that the fine and imprisonment of the circuit judge's contempt order is "serious" within the context of the risk and possible deprivation faced by the contemnor. There, a jailer was held in contempt for failing to respond to a judge's demand to guard an inmate. The contempt amount was $1,000.00. The Court of Appeals held that $1,000.00 was "serious" to a "civil servant without the massive resources attendant an international labor union." *Id.* at 317. Therefore, the lower court erroneously imposed the penalty without the necessary jury determination.

An award of $22,000.00 and one month in jail against an individual is "serious" under any proper interpretation of Kentucky law. The Court of Appeals found determinative the fact that movant did not request a jury trial. It would be an odd and unfair system to force the contemnor to guess what punishment will be handed. Such a system would force a possible contemnor to request a jury every time just to be sure. The rational system would require the judge to make them aware of the potential for "serious" punishment and their right to trial by jury. Any other system would needlessly encourage jury trials and their attendant time, costs and complexities.

In addition, this Court has stated that sanctions for indirect contempt (those occurring outside the direct presence of the judge) are to be scrutinized more carefully, stating:

> Ultimately, whatever slight burden our holding may impose on the judicial contempt power cannot be controlling. The court recognized more than a quarter-century ago:
>
> "We cannot say that the need to further respect for judges and courts is entitled to more consideration that the interest of the individual not be subjected to serious criminal punishment without the benefit of all the procedural protections worked out carefully over the years and deemed fundamental to our system of justice. Genuine respect, which alone can lend true dignity to our judicial establishment, will be engendered, not by the fear of unlimited authority, but the firm administration of the law through those institutionalized procedures which have been worked out over the centuries." *Bloom*, 391 U.S. at 208.
>
> Where, as here, "a serious contempt is at issue, considerations of efficiency must give way to the more fundamental interest of ensuring the even-handed exercise of judicial power." *United Mine Workers of*

*America* v. *Bagwell*, 512 U.S. 821, 129 L.Ed. 2d 642, 659 (1994).

Ms. Stetler was denied these basic protections.

## II. The Circuit Court was Manifestly Erroneous in its Conclusion that the Agreed Order Had Been Violated and It Further Prejudiced the Civil Rights of Linda Stetler by Attempting to Order Her to Violate State and Federal Law

Paragraph 5 of the Agreed Order required Spring Creek to:

> remove the barricade at the entrance to the runway from Olympus Drive, a distance of 33 feet from the south edge of the concrete walk in front of the real estate office and shall also remove the existing tree stump to ground level by noon, Tuesday, October 3, 1995.

Provision 5 did not even address agents of Spring Creek such as did the other provisions in the Agreed Order. Thus, Linda Stetler is being sanctioned for not obeying something she has no legal obligation to obey. Also, Spring Creek and Linda Stetler had prior to October 3, 1995 and at all times after complied fully with this provision. The Order required 33 feet - 39.5 feet was and still is provided. Further, the tree stump was taken to ground level. Respondent Mary Sander's testimony is in accord:

> Q. [Tom Osborne]: Ms. Sanders, you don't deny in any way that there is 33 feet between where the tree stump is now located that is open and this right here. Is that a fair statement?
>
> A. [Mary Sanders] That is right.

If she obeyed fully the dictates of provision 5, the Agreed Order would be internally inconsistent to allow this same action to violate other provisions.

The "Motion to Hold in Contempt" filed by Respondents alleged that provision 5 was broken. The proof in

open court demonstrated otherwise. Thus, the lower court's ruling was manifestly against the weight of the evidence. We stand in amazement that Ms. Stetler could be held in contempt for complying fully with the court order. Provision 5 required exactly 33 feet at the entrance to the runway at Olympus Drive. 39.5 feet was provided.

The contempt surrounded three movable chairs placed at Olympus Drive for several reasons, one of which included discouraging general traffic directly onto the runway. It should not matter what was placed there if Petitioner had already provided well over the 33 feet requested at Olympus Drive.

Upon apparently realizing that provision 5 had not been broken, the circuit judge stated:

> One and three, in my opinion, must be read in conjunction with this paragraph to get the entire tenor of the order...not isolate one particular section.

Provision 1 reads that Spring Creek "shall remove all barricades and obstructions or all easements, roadways or taxiways by noon, Monday, October 2, 1995 and shall not erect same in the future." This provision concerned four specific obstructions referenced in the discussion of the Agreed Order, all of which have been removed.

Under State law, the airport managers are obligated to ensure ground vehicles pose no threat to aircraft safety. Kentucky's Airport Safety Standards provide that the person who owns or controls a public use airport shall have control over a land area and a primary surface area at least 250 feet wide centered on the landing area. (Kentucky Administrative Regulations Title 602, Chapter 20:120 Section 7). Ms. Stetler manages this public-use airport and by law has an affirmative duty to exercise control over this area. While she has complied fully with the Agreed Order, if it be construed to allow her no control over in-

gress and egress to the landing-strip, then it directly runs afoul of Kentucky Aviation Law. (Kentucky Administrative Regulations Title 602, Chapter 20:020 *et seq.*) Provision 1 seems to strip her of all control if it is not read in connection with the four specific obstructions discussed prior to the Agreed Orders.

By their own testimony, Respondents have not been denied access to their property and nothing has been done that singles them out or otherwise serves to their detriment. Ms. Stetler has a due process liberty interest in being allowed to comply with the aviation laws. *Whalen* v. *Roe*, 97 S.Ct. 869, 876 (1977) (due process interest in independence in making certain kinds of important decisions). The circuit court's Contempt Order places Ms. Stetler right in between the proverbial rock and hard place. As evidence of this, there were numerous letters from state authorities informing her sternly of her duty to keep traffic off of and away from the runway.

These letters indicate the serious nature of keeping the runways clear. They also demonstrate that administrative action or possible criminal sanctions which are available to force Ms. Stetler to keep vehicles off the runway. In a letter dated June 29, 1995, Richard Isaacs of state transportation informed a group (including the Respondents) that the state supported Ms. Stetler's plan to lock up access points and to give responsible parties (including Respondents) a key. Respondents rejected such a plan and filed suit. Their success in court now endangers the public's safety and Ms. Stetler's freedom. Further, these letters are strong evidence that Ms. Stetler is not out to get revenge, but is only attempting to fulfill her important responsibilities. The state threatened to close the airport if vehicles were not kept away from the runway.

## III. Petitioner was Deprived of the Constitutional Right to Notice of the Contempt Charges

Due process of the XIV Amendment requires that a litigant or potential contemnor be provided with notice of the substance of charges or the criminal nature of the charges or claims to be brought against them. *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1967); *Fuentes* v. *Shevin*, 407 U.S. 67 (1972). The Respondents' "Motion to Hold in Contempt" cited a violation of only the provision 5 of the Agreed Order. Consequently, the hearing should have been limited only to that provision. How else could movant have been put on notice as to other violations or that the hearing would become the "fishing expedition" it resulted in?

The court sustained the objections of Petitioner's counsel to the testimony of Respondents relating to violation of any matter other than provision 5 of the Agreed Order. However, the court allowed this evidence to show intent to violate provision 5. Nevertheless, the court contradicted its earlier ruling and held Petitioner in contempt for matters outside of provision number 5. Respondents have contended that Petitioner's counsel waived any objection. The transcript of the hearing demonstrates this as folly. Once the court has ruled on an objection, Petitioner's counsel must obey or face the even greater direct contempt powers of the court.

## IV. The Petitioner was Entitled to the "Beyond a Reasonable Doubt" Standard

Petitioner was deprived the protection of other attributes of the criminal justice system such as the "beyond a reasonable doubt" standard. *United States* v. *Bayshore Associates, Inc.*, 934 F.2d 1391 (6th Cir. 1991). While Respondents have argued that this is irrelevant because Petitioner somehow admitted to violation, the hearing tes-

timony and Verified Petition are clear that Petitioner denies any violation and further asserts full compliance. Given the broad language of some of the provisions in the Agreed Order, it would take a jury to decide what is in fact a violation.

### V. Improper Grant of Attorney's Fees

Respondents requested attorney's fees of only $250.00, but were granted $500.00 by the court in addition to the award of *future* attorney's fees overturned by the Court of Appeals. The courts of Kentucky have consistently held that a court may not award a party greater relief than requested. *Belcher* v. *Hunt*, Ky. App., 248 S.W. 2d 717 (1952). As the Contempt Order should be overturned, no attorney's fees are owed, but, in any event, none should be granted over the amount requested by the parties.

## CONCLUSION

For the foregoing reasons this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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# APPENDIX

**APPENDIX A**

# SUPREME COURT OF KENTUCKY

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**97-SC-171-D**
**(95-CA-3337 & 95-CA-3398)**

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*Clinton Circuit Court*
*Nos. 95-CI-141 & 95-CI-142*

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LINDA STETLER - - - - - - - *Movant*

v.

MARY SANDERS,
LEWIS SANDERS,
JACKIE SHELTON and
VERNON SHELTON - - - - *Respondents*

## ORDER DENYING DISCRETIONARY REVIEW

The motion for review of the decision of the Court of Appeals is denied.

Cooper, J., would grant discretionary review.

ENTERED December 10, 1997.

Robert F. Stephens /s/

Chief Justice

RENDERED: DECEMBER 13, 1995 2:00 p.m.

NOT TO BE PUBLISHED

# COMMONWEALTH OF KENTUCKY
# COURT OF APPEALS

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**No. 95-CA-3337-MR**
**No. 95-CA-3398-MR**

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*Appeal From Clinton Circuit Court*
*Honorable Eddie C. Lovelace, Judge*
*Civil Actions Nos. 95-CI-00141 & 95-CI-00142*

---

SPRING CREEK ENTERPRISES, INC.,
A Kentucky Corporation, and
LINDA STETLER, Individually - - - - *Appellants*

*v.*

LEWIS SANDERS And His Wife,
MARY SANDERS, and
VERNON SHELTON And His Wife,
JACKIE SHELTON - - - - - - *Appellees*

**OPINION—AFFIRMING IN PART - REVERSING IN PART AND REMANDING**

BEFORE: DYCHE, GUIDUGLI and SCHRODER, Judges.

GUIDUGLI, JUDGE. This is an appeal from a judgment of the Clinton Circuit Court finding appellants in contempt of an agreed order. The Clinton Circuit Court ordered appellants to pay a fine totalling $22,000; pay $500 towards appellees' attorneys fees; pay the appellees' attorneys fees at the rate of $100 per hour for all time spent after the

entry of the order at issue, and; sentenced appellant, Linda Stetler, to thirty days in the Wayne County Jail.

Appellees are residents of Spring Creek Airport in Clinton County which is a "fly-in" community where 25-30 private homes surround the airport. Appellant, Spring Creek Enterprises, Inc., operates the airport and appellant Linda Stetler manages the facility. The area surrounding the airport is platted subdivisions containing building lots. For sometime prior to this action, appellant, Spring Creek Enterprises, Inc., through its employee, appellant, Linda Stetler, had been acquiring lots and closing roadways, taxiways, and accesses to the taxiways.

Tensions grew between the appellants and the adjoining property owners which escalated to property damage, harassing telephone calls and, threats of bodily injury. At least seven separate civil lawsuits were filed by adjoining property owners against the appellants seeking a declaratory judgment of property rights, including easements, and a permanent injunction against the closing of the access roads and taxiways. Simultaneous to the filing of the civil lawsuits, various criminal actions were pending in the Clinton District and Circuit Courts relating to acts alleged to have occurred at the airport. In short, a volatile situation existed.

The civil cases were heard together and resulted in the execution of an agreed order on October 2, 1995, between and among all of the plaintiff property owners (including the appellees) and the appellants. That order included the following paragraphs relevant to this appeal:

> 1. Springcreek Enterprises, Inc., and/or its agents shall remove all barricades and obstructions on all easements, roadways or taxiways by noon, Monday, October 2, 1995 and shall not erect same in the future.
>
> * * *
>
> 3. All parties and/or agents in the above captioned, pending civil actions, shall not trespass or engage in

threatening, intimidating or harassing communications or conduct in any form with respect to all other' parties.

* * *

5. Springcreek Enterprises, Inc. will remove the barricade at the entrance to the runway from Olympus Drive, a distance of 33 feet from the south edge of the concrete walk in front of the real estate office and shall also remove the existing tree stump to ground level by noon, Tuesday, October 3, 1995.

On October 31, 1995, appellees filed a motion to hold appellants in contempt for alleged violations of the agreed order. This motion did not specifically refer to any one paragraph but alleged that the agreed order had been intentionally violated by appellants' failure to "remove barricades at the entrance to the runway from Olympus Drive, a distance of 33 feet from the South edge of the concrete walk in front of the real estate office and also remove the existing tree stump to ground level." The motion further alleged said acts had been committed "with intent to harass and intimidate the Plaintiffs." Fairly read, this motion alleged violations of all three paragraphs of the agreed order quoted above.

The contempt motion was noticed and originally heard on November 15, 1995, but neither appellant Linda Stetler, nor her counsel were present. Appellants' counsel filed a motion to stay proceedings to enforce judgment giving legitimate reasons for his absence and his clients'. The absence of appellant and her counsel was subsequently found to be the result of excusable neglect and the hearing was rescheduled for November 22, 1995, at which time all parties and counsel were present and proof was taken.

Appellants' first allegation of error is that they were not given appropriate notice of the violations with respect to which they were to show cause thereby violating their due process rights. Appellants argue they were only prepared to address alleged violations of paragraph five. The record does not support this claim. During the testimony of Linda Stetler, the trial court ruled, "I am not going to

limit it to No. 5." Appellants' counsel responded, "All right, Your Honor." No objection was made in the record to cross-examination of Ms. Stetler on matters beyond the scope of paragraph five. Moreover, several minutes later, counsel for appellees requested leave to cross-examine Ms. Stetler on matters beyond paragraph five to show "a common scheme of attempts to not comply with this Court's Order and that there were blockages that violate numerical paragraph one in this Order." The court gave permission to ask and counsel for appellants stated, "And, I would not object, Your Honor, under that circumstance." Appellants clearly waived any due process claim as to the testimony of Ms. Stetler. Whether or not the court later limited the testimony of other witnesses is immaterial because Ms. Stetler's testimony standing alone contained numerous admissions of clear violations of both the spirit and the letter of the agreed order.

Appellants argue the court erred in assessing a per diem fine of $500 from October 2, 1995 (the day the agreed order was executed by the parties), until November 15, 1995, when all obstructions were removed pursuant to the order. The court found the contempt lasted 44 days and fined appellants $22,000. Appellants cite *Miller* v. *Vettiner*, Ky., 481 S.W.2d 32 (1972), *International Association of Firefighters* v. *Lexington*, Ky., 555 S.W.2d 258 (1977), and *Vaughn* v. *Asbury*, Ky. Ap., 726 S.W.2d 315 (1987), as supportive of the proposition that the trial court exceeded its authority in assessing the fine and jail sentence without a jury. In *Miller, supra,* the Court held:

> [W]hen the existence or nonexistence of a contempt, civil or criminal, requires the resolution of a factual issue the trial court may itself resolve that issue upon the basis of a hearing in which the alleged offender is afforded a fair opportunity to present a defense, but it may not in such a case inflict a fine greater than $500 and incarceration for more than six months except upon the unanimous verdict of a jury finding the offender guilty beyond a reasonable doubt.

*Id.* at 35.

The trial court found appellants' contempt to have been a continuing one and imposed a *per diem* fine of $500 and a sentence of imprisonment of thirty days, none of which is contrary to cases cited by appellant. Moreover, this Court recently held in *Donta* v. *Commonwealth*, Ky. App., 858 S.W.2d 719 (1993), that a jury trial is not an absolute requirement in every criminal case:

> True enough, KRS 29A.270 guarantees defendants jury trials in all criminal prosecutions, including those for even the most minor types of offenses. However, by stating that a "request" for a jury trial may be made at anytime prior to the time a case is called for trial, this statute by implication imposes a clear burden on the accused to make a demand for a jury trial.

*Id.* at 723.

The United States Supreme Court has also recently addressed the issue of the right to a jury trial in contempt proceedings holding "Because the right to a trial by jury applies only to serious criminal sanctions, courts still may impose noncompensatory, petty fines for contempt such as the present ones without conducting a jury trial." *United Mine Workers* v. *Bagwell*, __ U.S. __ , 129 L.Ed.2d 642, 659 (1994).

Nowhere in the record did appellants' request a jury trial or object to the hearing before the trial court without a jury and appellants were represented by counsel throughout the proceedings. The trial court imposed what we deem to be "petty" fines within the context of the risk and possible deprivation faced by appellants (*International Association of Firefighters, supra),* and the sentence of imprisonment was less than six months- not a "serious criminal sanction" under *Bagwell, supra.* We hold that the trial court's order relative to fines and imprisonment was lawful in all respects.

Appellants also claim the trial court granted relief in excess of that requested by appellees in relation to attorneys fees. The record indicates the appellees requested the court "to require the Defendant, Linda Stetler, to pay the

legal cost of the Plaintiffs of bringing of [sic] this motion in the sum of $250.00." The record reflects that two identical motions were filed in two distinct civil actions (95-CI-141 & 95-CI-142) on behalf of separate plaintiffs (appellees) against the same defendants (appellants). As such, the total award of $500 to the same attorney for two separate clients does not exceed the request in the motion or the court's inherent equitable powers. This assignment of error is without merit.

Lastly, appellants appeals from the court's order requiring them to pay "all legal fees of Plaintiffs' counsel that pertain to subsequent legal services rendered pursuant to the above-referenced actions subsequent to the date of November 15, 1995 at the rate of $100.00 per hour... ." Awards of attorney' fees are rarely upheld except when such fees are authorized by contract between the parties or by statute. *White* v. *Sullivan*, Ky. App., 677 S.W.2d 385 (1983). We believe the prospective award of fees in this case exceeded the court's equitable powers and we must therefore reverse the award of attorneys' fees subsequent to November 15, 1995.

This cause is affirmed in part, reversed in part and remanded to the Clinton Circuit Court for entry of an order consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANTS:
Thomas L. Osborne, P.S.C.
Sheffer & Hoffman
Paducah, KY

BRIEF OF APPELLEES:
David R. Choate
Albany, KY

COMMONWEALTH OF KENTUCKY
40TH JUDICIAL CIRCUIT
**CLINTON CIRCUIT COURT**

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**Case No. 95-CI-00141**
**Case No. 95-CI-00142**

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VERNON SHELTON and wife,
JACKIE SHELTON
Spring Creek Estates
Albany, Kentucky 42602
and
LEWIS SANDERS and wife,
MARY SANDERS
Spring Creek Estates
Albany Kentucky 42602 - - - - - *Plainffs*

*v.*

SPRING CREEK ENTERPRISES, INC.,
a Kentucky Corporation and LINDA
STETLER, Individually
Spring Creek Estates
Albany, Kentucky 42602 - - - - *Defendants*

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**FINDINGS OF FACT, CONCLUSIONS OF LAW, JUDGMENT AND ORDER**

FINDINGS OF FACT

1. The above styled actions were filed in the Clinton Circuit Court on the 25th day of September 1995, seeking a Declaratory Judgement by the Court to the effect that certain roadways, taxiways, and other property accesses at Spring Creek Airport in Clinton County Kentucky were open to public use and that the Defendants had intentionally placed chairs, barricades, and other obstructions across

said accesses in an attempt to deny Plaintiffs access to their properties.

2. There were numbers of pending cases pertaining to Spring Creek Airport, including both Civil and Criminal actions, and all of said Civil actions, including the above styled cases, were advanced on the docket of this Court for a hearing on all pending Motions in an attempt to defuse what the Court considered a volatile situation.

3. A hearing was held in this Court on Saturday, September 30, 1995, and after a full day of testimony an agreement was reached between all parties and their counsel pertaining to the various questions raised in the Civil litigations and an Agreed Order was executed by counsel for all parties on the 2nd day of October, 1995 and said Order was entered in the Court record on the 4th day of October, 1995.

4. Pursuant to said Agreed Order, Defendants, Linda Stetler, individually and Spring Creek Enterprise, Inc., were required to remove all barricades and obstructions on all easements, roadways, or taxiways by noon, Monday, October 2, 1995 and same were not to be erected in the future.

5. Defendants were further required pursuant to said Agreed Order to remove the barricade at the entrance to the Airport runway from Olympus Drive, a distance of 33 feet from the South edge of the concrete walk in front of the real estate office and to further remove the existing tree stump to ground level by noon, Tuesday, October 3, 1995.

6. Prior to the entry of the above referenced Order, the Court, in concert with all legal counsel for Plaintiffs and Defendants, traveled to the Spring Creek Airport for a viewing of the alleged blockages.

7. Plaintiffs, by Motion and Notice filed on the 31st day of October, 1995, moved the Court to require the Defendants, and each of them, to show cause why they should not be held in Contempt of Court for violation of that Court Order which was executed by the Court on the 2nd day of

October, 1995 and entered on the Court record on the 4th day of October, 1995. The grounds for said Motion were that Defendants had intentionally violated the Courts previous Order by blocking the access running from Olympus Drive to the Spring Creek Airport runway by the placing of chairs across the access with said acts being committed by Defendants in an attempt to harass and intimidate the elderly Plaintiffs.

8. A hearing on the Motion for Contempt was set for the 15th day of November, 1995 and a copy of the Motion and Notice was certified and mailed to Hon. Luther C. Conner, Jr. Attorney at Law, Granville Hotel Bldg., Albany, Kentucky, 42602, Counsel for Defendants on the 31st day of October, 1995.

9. The above styled cases were called for hearing on the 15th day of November, 1995 pursuant to Motion of Plaintiffs to hold Defendants in Contempt and neither Defendants nor their legal counsel appeared at the hearing.

10. Testimony was given by Plaintiffs at the duly scheduled time for the hearing on Plaintiffs Motion and the Court after hearing said testimony found that the Defendants had indeed intentionally violated that Order, dated October 2, 1995 by the placing of chairs across the easement granted to Plaintiffs as access to their properties which access was to run from Olympus Drive to the Spring Creek Airport runway.

11. The Court ordered on November 15, 1995 that Defendant, Linda Stetler, be incarcerated in the Wayne County Kentucky jail for a period of 30 days; that Defendants, Linda Stetler and Spring Creek Enterprise, Inc., jointly and severally, pay a fine unto the Clinton Circuit Court in the sum of $500.00 per day for each day of violation of this Courts Order with said fine to commence as of the date of October 2, 1995 and to run until such time as all obstructions were removed pursuant to that Order; that legal fees of Plaintiffs counsel in the bringing of the Motions and attendance at the hearing in the sum of $500.00 be paid

within 15 days of the entry of said Order.

12. Counsel for Defendants did, on the 16th day of November, 1995, file a Motion to Stay Proceedings to Enforce Judgment and further filed a Motion for Relief from Judgement pursuant to Civil Rule 60.02. On the 17th day of November, 1995 the Court sustained said Motion to Stay Proceedings and Enforce Judgment and scheduled a hearing on all pending Motions to be heard by the Court on the 22nd day of November, 1995 at 9:00 a.m.

13. Plaintiffs and their legal counsel as well as Defendants and their legal counsel appeared pursuant to Order of this Court on the 22nd day of November, 1995. Counsel for Defendants was heard pertaining to his Motion to set aside the Courts previous judgment as a result of excusable neglect under Civil Rule 60.02 and the Court sustained said Motion and agreed to take new testimony pertaining to Plaintiffs Motion to hold Defendants in Contempt.

14. Testimony was given by Plaintiff, Mary Sanders, pertaining to the blockage of the access to the Spring Creek Airport runway from Olympus Drive through the placing of chairs across said access and testimony was further given by Defendant, Linda Stetler, pertaining to the placement of said chairs.

CONCLUSIONS OF LAW

1. The Court after having heard testimony of Plaintiff, Mary Sanders, Defendant, Linda Stetler, individually and on behalf of Defendants Spring Creek Estates, Inc., and after having heard arguments of counsel and being sufficiently advised, finds that the Defendants, Linda Stetler, and Spring Creek Enterprise, Inc., jointly and severally, are in Contempt of this Court as a result of their intentional violation of that Order previously entered on the 2nd day of October, 1995 which Order was entered in the Court record on the 4th day of October, 1995 in that said Defendants have failed to remove all barricades and obstructions on all easements, roadways or taxiways at Spring Creek Airport by noon, Monday, October 2, 1995 and to not erect same in the future.

2. The court finds the Defendants, and each of the, to have violated the above referenced Order by the placing of barricades in the form of folding chairs on the easement granted to Plaintiffs running to Spring Creek Airport runway from Olympus Drive.

3. The Court finds that this violation has been continuous since the 2nd day of October, 1995 through the 15th day of November, 1995.

JUDGEMENT AND ORDER

1. Defendant, Linda Stetler, is held in Contempt of this Court's previous orders and accordingly shall be incarcerated for a period of 30 days with said incarceration to be at the Wayne County Correctional Facility, Monticello, Kentucky.

2. Defendants, Linda Stetler and Spring Creek Enterprise, Inc., jointly and severally, shall pay a fine to this Court in the sum of $500.00 per day commencing with the 2nd day of October, 1995 and running through the date of November 15, 1995, same being a total of 44 days with the total fine at $500.00 per day being the sum of $22,000.00. and said fine shall be paid within 30 days of the entry of this Order.

3. Defendants, jointly and severally, shall pay the legal fees of David R. Choate, Attorney at Law, legal counsel for Plaintiffs, in the sum of $500.00 for the bringing of the Motion for Contempt and the hearing on same that was held on the 15th day of November, 1995. Defendants shall further pay all legal fees of Plaintiffs counsel that pertain to subsequent legal services rendered pursuant to the above referenced actions subsequent to the date on November 15, 1995 at the rate of $100.00 per hour with counsel for Plaintiffs to submit a billing for his services to this Court for approval. Subsequent to the approval of the billing for said legal services same shall be paid by Defendants, jointly and severally, within 15 days of the entry of said Order.

4. That by stipulation and agreement, counsel for Plaintiffs and counsel for Defendants, jointly submitted to

the Court a survey of a 1986 easement setting forth the exact location of the easement from Olympus Drive to the Spring Creek Airport runway. It is ordered that said easement be opened at the location as described in the survey submitted to the Court and Defendants are ordered to remove any all barricades blocking that easement as described on the survey plat submitted to the Court on the 22nd day of November, 1995.

5. This Order shall be stayed for a period of 5 days from the entry of same in which time Defendants shall be allowed to appeal this Order if they so desire. Should a Notice of Appeal of said Order not be filed within 5 days of the entry hereof then the orders of this Court shall be carried out by any law enforcement officer.

Entered this 6 day of December, 1995.

Eddie Lovelace /s/

HON. EDDIE C. LOVELACE
CLINTON CIRCUIT JUDGE

Clerk's Certificate
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/S/

Ralph Groce, Circuit Court Clerk

## APPENDIX B

### AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land of naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

### AMENDMENT XIV

#### Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

#### Section 2

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representations therein shall be reduced in the proportion which the number of such male citizens

shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3

No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by vote of two-thirds of each house, remove such disability.

Section 4

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.